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# THE ACTIVE ADMINISTRATIVE LAW JUDGE: IS THERE HARM IN AN ALJ ASKING?

Professor Allen E. Shoenberger\*

Administrative Law Judges occupy a difficult judicial position in American Law because of the multitude of responsibilities assigned, responsibilities that are sometimes more extensive than ordinary trial judges. The typical image of an American trial judge is that of an impartial umpire, calling balls and strikes, but otherwise not participating in playing the game. Reliance is placed upon opposing counsel to bring out the facts and the law. While there are some courtrooms where such passive judging is not the norm, litigants and attorneys primarily expect the judge to be relatively passive in our adversarial system of justice.<sup>1</sup>

Such passive "luxury" is often denied to ALJs, sometimes by statutory command. For example, federal ALJs have an explicit responsibility in social security cases to conduct the administrative hearing in a manner designed to elicit all pertinent information regarding the claimant's disability.<sup>2</sup> Such duty is particularly acute when the claimant is unrepresented by counsel, for the ALJ then has a higher duty to probe "scrupulously and conscientiously" into all relevant facts so that such facts become a part of the record.<sup>3</sup>

However, many state ALJs in particular are not so explicitly

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<sup>1</sup> Contrast this with the inquisitorial style of justice prevalent in civil law jurisdictions.

<sup>2</sup> See, 42 U.S.C. § 423(d)(5)(B); 20 C.F.R. §§ 404.1512(d) & 20 C.F.R. § 416.912 (d) ("We will develop your complete medical history . . . . We will make every reasonable effort to help you get medical records." ), and 20 C.F.R. § 410.640. ("If the Administrative Law Judge believes that there is relevant and material evidence available which has not been presented at the hearing, the Administrative Law Judge may adjourn the hearing or, at any time . . . reopen the hearing for the receipt of such evidence.") See, *Key v. Heckler*, 754 F.2d 1545, 1550-51 (9th Cir. 1985); *Smith v. Secretary of Health, Educ. and Welfare*, 587 F.2d 857, 860 (7th Cir. 1978).

<sup>3</sup> *Cannon v. Harris*, 651 F.2d 513, 519 (7th Cir. 1981). (Internal quotation marks and citations omitted.)

directed to ensure that the record is complete.<sup>4</sup> Thus authority to question is not as clear. Indeed, in contrast to federal social security hearings in which the government is not represented before the ALJ by a lawyer, many administrative hearings both state and federal involve lawyers representing a government agency on the one side, and on the other side, an individual or business entity which may or may not be represented by a lawyer. It is common in cases in which a lawyer appears for a party before an ALJ for the lawyer to object to questioning by the ALJ, frequently accompanied by a suggestion that by active questioning the ALJ has shed her garb of impartiality and taken an active role on one side or the other of the dispute.

This article analyzes the existent authority on the limits of ALJ questioning and closely related conduct and suggests that reported authority strongly supports ALJ "activism," so long as appropriate decorum is preserved. In short, it appears that the decision of an ALJ is unlikely to be overturned simply because of over vigorous questioning by the ALJ.

At a constitutional level due process guarantees apply. Such guarantees may be violated when the hearing officer presents the case for one party, cross-examines the witnesses of the other party, and then decides the case, although this is a fairly accurate description of the functions of a social security ALJ.<sup>5</sup> The basic requirement of constitutional due process is a fair and impartial tribunal, whether at the hands of a court, an administrative agency or a government hearing officer. *Schweiker v. McClure*, 456 U.S. 188, 195 (1982), *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), *Tumey v. Ohio*, 273 U.S. 510 (1927).<sup>6</sup>

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<sup>4</sup> Of course some state ALJs have similar responsibilities explicitly provided for in state law. See, *Claim of Boudreau*, 677 N.Y.S.2d 407, 408 (N.Y.A.D. 1998) ("The ALJ was charged to 'conduct the hearing in such order and manner and with such methods of proof and interrogation as the judge deems best suited to ascertain the substantial rights of the parties' (12 NYCRR 461.4 [a])." Accord, *Claim of O'Connor*, 165 A.D.2d 946, 948, 561 N.Y.S.2d 318, 320 (N.Y.A.D. 1990); *Allison v. Pennsylvania Human Relations Com'n*, 716 A.2d 689, 692 (Pa.Cmwlth, 1998) (alleged quasi-prosecutorial questioning permitted as authorized by statute).

<sup>5</sup> 1 F. Cooper, *STATE ADMINISTRATIVE LAW* 336, 340 (1965), *Figueroa Ruiz v. Delgado*, 359 F.2d 718 (1st Cir. 1966), see *Wong Yang Sung v. McGrath*, 339 U.S. 33, 45-46 (1950), *Burhoe v. Whaland*, 116 N.H. 222, 356 A.2d 658 (1976).

<sup>6</sup> Contrast, *Police Com'r of Boston v. Municipal Court of the W. Roxbury Dist.*, 368 Mass. 501, 507, 332 N.E.2d 901 (1975) (hearing officer not disinterested where counsel represented his wife in acrimonious divorce proceedings).

Decision makers are constitutionally unacceptable: 1) where the decision maker has a direct personal, substantial, and pecuniary interest in the outcome of the case;<sup>7</sup> 2) where an adjudicator has been the target of personal abuse or criticisms from the party before him; and 3) when a judicial or quasi-judicial decision maker has the dual role of investigating and adjudicating disputes and complaints. However, a person challenging the impartiality of a decision maker faces two presumptions: 1) the strong presumption of honesty and integrity of the adjudicators; and 2) the strong presumption that those making decisions affecting the public are doing so in the public interest.<sup>8</sup>

Moreover, any appraisal of the situation must be made "under a realistic appraisal of psychological tendencies and human weaknesses . . . ." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). The existence of partiality is not demonstrated by a hearing officer having a conviction rate of 99.5 percent, or that the officer had formerly served as a corrections officer.<sup>9</sup> Nor is "Bias . . . conclusively established merely because an ALJ uniformly credits one party's witnesses over another's."<sup>10</sup> Indeed, as the Supreme Court has stated:

The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task. As Judge Jerome Frank pithily put it: "Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those courthouse dramas called trials, he could never render decisions." *In re J.P. Linahan, Inc.*, 138 F.2d 650, 654 (CA2 1943). Also not

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<sup>7</sup> Even an indirect pecuniary interest while on a temporary leave of absence may disqualify a hearing officer. *Deretich v. Office of Administrative Hearings, State of Minn.*, 798 F.2d 1147, 1152 (8th Cir.1986) .

<sup>8</sup> *Valley v. Rapides Parish School Board*, 118 F.3d 1047, 1052-3 (5th Cir. 1997).

<sup>9</sup> *Sales v. Murray*, 862 F.Supp. 1511 (W.D.Va. 1994).

<sup>10</sup> *NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679, 687 (7th Cir.1982).

subject to deprecatory characterization as "bias" or "prejudice" are opinions held by judges as a result of what they learned in earlier proceedings. It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant.

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Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. . . . Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration--even a stern and short-tempered judge's ordinary efforts at courtroom administration--remain immune. *Liteky v. United States*, 510 U.S. 540, 551, 555-56 (1994).

Moreover, "[J]udicial remarks . . . ordinarily do not support a bias or partiality challenge ... [unless, for example,] they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Baldwin Hardware Corp. v. Franksu Enter. Corp.*, 78 F.3d 550, 557 (Fed.Cir.1996).<sup>11</sup> "[A]n A.L.J. possesses wide latitude in the conduct of the hearings before him regarding direct and cross-examination, the handling of objections, and arguments of counsel."<sup>12</sup>

Conversely, complementary statements about one side or the other do not necessarily indicate lack of impartiality.<sup>13</sup> Nor is, "Bias ... established simply by showing the ALJ favored one party's witnesses

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<sup>11</sup> The hearing officer's response to counsel's vexatious attitude was not only justified, but entirely proper. *Roland M. v. Concord School Committee*, 910 F.2d 983, 997 (1st Cir. 1990), cert. denied, 499 U.S. 912 (1991).

<sup>12</sup> See, 29 C.F.R. §§102.35, 102.64(a) (1987) (duty to enquire fully into "the facts" or "all matters and issues"); *NLRB v. Overseas Motors, Inc.*, 818 F.2d 517, 520 (6th Cir.1987) (A.L.J. can interrupt or question witness to clarify testimony); *N.L.R.B. v. Baddour, Inc.*, 848 F.2d 193, (6th Cir. 1988) (Table), 1988 WL 49075 , cert. denied, 488 U.S. 944 (1988).

<sup>13</sup> "The ALJ simply stated . . . that Mr. Taylor's professional conduct as an attorney before the ALJ had always been of the 'highest caliber.' This is not the type of statement that demonstrates judicial prejudice." *Chaney Creek Coal Corp. v. Federal Mine Safety & Health Review* , 866 F.2d 1424, 1432 (D.C.Cir. 1989).

over the other party's witnesses."<sup>14</sup>

The possession of, and explicit statement of a particular policy position on the law is not inconsistent with impartiality. In one case a hearing officer had extensively published on the theory of punishment, which then became the basis of an attack on his "bias." The Sixth Circuit rejected this attack, stating, "It may be sound advice to all judges and judicial officers to be as temperate as possible when rendering decisions. It would, however, be a great disservice to imply that a vigorous expression of views on a subject appropriately before the tribunal can become evidence of judicial bias."<sup>15</sup>

Thus statements and questions posed by an ALJ merit great latitude, since they, like judges are similarly placed, often in the midst of the heated caldron of litigation. That does not mean, however, that there are no limits on what the ALJ may say or do.

For example, some conduct, such as the continued presence of corrections officers in the hearing room throughout the hearing, including after the hearing was concluded but before the decision was determined, raises serious constitutional questions.<sup>16</sup> Such presence may create "an unacceptable risk of unfairness."<sup>17</sup> Similarly, following a reluctant witness to a parking lot, persuading them to come back and promising a limitation on questioning was inappropriate conduct.<sup>18</sup>

Similarly, statements such as recognition by a hearing officer that a "wrong decision" might have adverse funding implications for an agency (in the form of a cut off of federal highway money to the agency) sufficiently conveyed the appearance of pressure against the state and required reversal.<sup>19</sup> Neither can one condone a statement prior to the defense putting on its case that the defendant was guilty of a traffic offense, and that all the hearing was about was whether there

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<sup>14</sup> *Impact Industries, Inc. v. N.L.R.B.*, 847 F.2d 379, 381 (7th Cir., 1988). See also, *Colfor Inc. v. N.L.R.B.*, 838 F.2d 164, 168(6th Cir.1988) (rejecting an attack on an ALJ because of "unnecessarily disparaging descriptions of [defendant's] actions" and [the ALJ's] "emotional" and "vituperative" discussion of the impasse issue, when such views were acquired during the course of the hearing and not extrajudicially).

<sup>15</sup> *Garver v. U.S.*, 846 F.2d 1029, 1031 (6th Cir.1988), cert. denied, 488 U.S. 820 (1988).

<sup>16</sup> *Moore v. Scully*, 90 Civ. 3817, 1993 WL 22129 (S.D.N.Y. 1993).

<sup>17</sup> *Giano v. Sullivan*, 709 F.Supp. 1209, 1216 (S.D.N.Y. 1989).

<sup>18</sup> *Korunka v. Department of Children and Family Services*, 259 Ill.App.3d 527,530, 631 N.E.2d 759, 761, 197 Ill.Dec.537, 539 (Ill.App. 4 Dist. 1994).

<sup>19</sup> *In re Jack O'Lantern, Inc.*, 118 N.H. 445, 387 A.2d 1166 (N.H. 1978).

were any mitigating circumstances.<sup>20</sup>

In general, however, ALJ questioning is permissible, just as is similar questioning by judges.<sup>21</sup> Problems most frequently arise when questioning becomes overly extensive or overly aggressive but modest questioning presents no difficulty. For example, the Arizona Court of Appeals found no problem with hearing officer questions that occupied 16 of 225 pages of transcript (7 percent) of a hearing.<sup>22</sup> Nor was a single question line improper suggesting that a particular document had neither been admitted nor disclosed to the opposing side.<sup>23</sup>

However, a tribunal's partiality was suspect when nearly half the questions asked were asked by the hearing officer, as well as because the questions were misleading and confusing.<sup>24</sup> Moreover, the questioning at times "approximated adversarial cross examination."<sup>25</sup> Since both parties were represented by able counsel who were capable of presenting and developing the positions of their respective clients such intervention was particularly inappropriate.<sup>26</sup> Similarly, in another case rigorous cross examination, including clear attempts to discredit testimony and secure admission of wrongdoing, stepped over the line.<sup>27</sup> In contrast, questioning has been approved which was described as vigorous in driving for specifics, but not to the point of

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<sup>20</sup> *Eilers v. District of Columbia Bureau of Motor Vehicles Servs.*, 583 A.2d 677, 686-88 (D.C.1990). In *Eilers*, the hearing examiner, "announced that he was 'convinced' that Mr. Eilers had committed a traffic violation," before the defense testimony was presented, and he then asked if there was anything "in mitigation" before the defense had an opportunity to argue the merits.

<sup>21</sup> *Burhoe v. Whaland*, 116 N.H. 222, 223, 356 A.2d 658, 659 (N.H. 1976); *State v. Davis*, 83 N.H. 435, 436, 144 A. 124, 125 (N.H. 1928); 3 J. Wigmore, *EVIDENCE* § 784 (Chadbourn rev. 1970). A bar association trial committee did not violate due process requirements or statutory requirements by questioning witnesses, or by indicating that if it felt the need, it would call independent witnesses. *In re Cornelius*, 520 P.2d 76 (Alaska 1974).

<sup>22</sup> *Turf Paradise, Inc. v. Arizona Racing Commission*, 160 Ariz. 241, 245, 772 P.2d 595, 599 (Ariz. App. Div. 2 1989). Only three of seven witnesses who testified were questioned by the hearing officer.

<sup>23</sup> *Ford v. Industrial Commission of Arizona*, 145 Ariz. 593, 599, 703 P.2d 537, 543 (Ariz. App. Div. 1, 1984), approved in part, vacated in unrelated part, 145 Ariz. 509, 703 P.2d 453 (Ariz. 1985).

<sup>24</sup> *Kosik v. Industrial Commission*, 125 Ariz. 535, 611 P.2d 122 Ariz. (App. Div 2 1980).

<sup>25</sup> *Id.* at 125 Ariz. 538, 611 P.2d at 125. The questions also presented problems in form.

<sup>26</sup> *Id.*

<sup>27</sup> *Burhoe v. Whaland*, 116 N.H. 222, 223, 356 A.2d 658, 659 (N.H. 1976).

being overzealous, badgering or reflecting bias.<sup>28</sup>

Abuse of position by the ALJ obviously should be avoided, particularly action that can be characterized as intimidating. For example in *Ventura v. Shalala*, 55 F.3d 900, 903-4 (3rd. Cir. 1995) the court described the ALJ's actions as follows:

The ALJ continued to intimidate claimant's representative:

**ALJ:** ... I'm not trying to hurt Mr. Ventura, but you're not doing one damn thing to help him. So why don't you sit back and listen for a second.

The representative agreed to provide the ALJ with whatever information he wanted from the veterans' hospital and presented the ALJ with detailed information concerning claimant's visits to the veterans' hospital. However, the ALJ further reprimanded claimant's representative when he attempted to question the medical expert on the stand.

**ALJ:** First of all, you're trying to knock out evidence that's favorable to Mr. Ventura. So wake up and smell the roses on this case. His problem lies in the emotional area.

Claimant's representative again attempted to question the expert concerning the physical causes of claimant's back pain and again the ALJ reprimanded the representative preventing this line of questioning.

**ALJ:** Why are you reading this to death when I said that primarily if he's got this emotional condition as the VA Center seems to think he has, it's going to be beneficial to him? Why are you trying to kill this thing on the physical when it's not going to matter to him?

The ALJ's continuous interference with the representative's introduction of evidence of the physical causes of claimant's back pain violated the ALJ's duty to develop the record fully and fairly to consider seriously the findings of a treating physician. (citations omitted)

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<sup>28</sup> Com., Pennsylvania Labor Relations Bd. v. County Com'rs, 45 Pa. Cmwlth. 102, 107, 405 A.2d 577, 579 (Pa. Cmwlth. 1979).



Nor is it improper to limit questions that attorneys seek to ask, at least so long as the questions themselves are in fact improper.<sup>29</sup> The fact that an attorney and the hearing officer “clashed, sometimes bitterly, over rulings that the hearing officer made during the course of the hearing” does not in itself indicate prejudgment of the case or inability to fairly render a decision.<sup>30</sup> However, it is worth noting that an invitation to submit a post hearing brief, with an indication that the plaintiff’s position would be seriously considered, was treated as significant by the court.<sup>31</sup> As a practical matter, allowing a party to make such submissions serves two serious functions. If the ALJ has erred, it gives the ALJ an opportunity to correct herself. Alternatively, failure to utilize such an offer is likely to be viewed as waiver on any appeal. Similarly, failure to recall witnesses to address questions posed by an ALJ may be construed against a party.<sup>32</sup>

Of course, failure to permit appropriate cross examination constitutes reversible error.<sup>33</sup> Care should obviously be exercised in preventing an attorney from asking questions. Indeed, it is often the case that it might be better to permit an improper question or two to be asked and answered than to spend substantial time at a hearing debating with counsel the appropriateness of particular questions. Indeed, unless the attorney’s questions are clearly irrelevant, precluded by controlling law, designed to prolong the hearing or for some other improper purpose, such as treading upon important areas of privilege, the harm in permitting such questions is likely to be minimal, whereas the risk of reversal and additional expense and time is such that it isn’t worth a

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<sup>29</sup> *Mont v. Chater*, 114 F.3d 1191, 1997 WL 201626 at \*11 (7th Cir. 1997) (Table).

<sup>30</sup> *Bostrom v. Commissioner of Motor Vehicles*, 1997 WL 242889 at \*2 (Conn. Super, 1997).

<sup>31</sup> *Id.*

<sup>32</sup> *Bickham v. Selcke*, 216 Ill.App.3d 453, 461, 576 N.E.2d 975, 979, 160 Ill.Dec. 21, 25) (Ill.App. 1 Dist. 1991) (“Plaintiff had the option of recalling . . . witnesses to elicit any further information which plaintiff deemed helpful or necessary to his defense and of filing motions to strike any alleged improper questions or answers brought out during direct examination.” Three board members and the hearing officer had questioned two witnesses.)

<sup>33</sup> *Bostrom*, 1997 WL242889 at \*3. The hearing officer prohibited the plaintiff’s attorney from cross examination on the reliability of the particular Intoxilyzer machine employed in the case.

fight to keep such questions out.<sup>34</sup>

Certain types of questions appear to be lightning rods for objections if posed by an ALJ, particularly with counsel representing a claimant or party present in the hearing. For example, federal social security ALJs have been frequently criticized for inadequate hypothetical questions,<sup>35</sup> oftentimes with allegations that the question was "misleading, biased and incomplete in that it fails to present ... a full picture of [the claimant's] impairment."<sup>36</sup> However, omissions of characteristics from a hypothetical question because the ALJ determines that such matters have not been demonstrated to be relevant, does not invalidate a question.<sup>37</sup> Moreover, the presence of the claimant's attorney who could have presented additional questions has been construed to mean that failure to do so waives any error.<sup>38</sup> The law is clear that failure to include significant limitations in a hypothetical question invalidates any response to the question.<sup>39</sup>

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<sup>34</sup> An offer of proof that is included in the record may cure any potential error on appeal. *See*, *Erickson v. Aaron's Automotive Products, Inc.*, 967 S.W.2d 661, 664 (Mo.App. 1998).

<sup>35</sup> Since hypothetical questions often go to the heart of disputed issues, and the answers are often outcome determinative, such questions are obvious targets for dispute.

<sup>36</sup> *Mont v. Chater*, 114 F.3d 1191, 1997 WL 201626, at \* 8 (7th Cir. 1997) (Table).

<sup>37</sup> *Id.* Accord, *Pertuis v. Apfel*, 152 F.3d 1006, 1007 (8th Cir. 1998) ("The ALJ based his hypothetical question upon those limitations which he found to be credible and supported by the evidence."); *Ehrhart v. Secretary of Health and Human Services*, 969 F.2d 534, 540 (7th Cir. 1992); *Magallanes v. Bowen*, 881 F.2d 747, 756 (9th Cir. 1989), ("Hypothetical questions posed to the vocational expert must set out all the limitations and restrictions of the particular claimant.... For reasons already given, the restrictions contained in the ALJ's hypothetical based on Dr. Auerbach's report are amply supported by the record, and therefore the ALJ properly relied on Dr. Meadow's testimony in determining Magallanes's residual functional capacity."); *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir.1986); *Lasirona v. Apfel*, 1998 WL 410895, at \*3, 57 Soc.Sec.Rep.Ser. 147 (N.D.Cal. Jul 17, 1998) (Proper to exclude Dr's conclusions from hypothetical question because the ALJ "believed the [Dr's] report was obtained specifically to support plaintiff's claim for disability, and because the report was not supported by sufficient underlying findings to overcome other evidence and establish limitations that preclude medium work.")

<sup>38</sup> *Lasirona v. Apfel*, at \* 9.

<sup>39</sup> *Podedworny v. Harris*, 745 F.2d 210, 218 (3rd Cir. 1984) ("These impairments, dizziness and blurred vision, are medically undisputed and could seriously affect appellant's ability to engage in alternative employment. The ALJ did not mention these problems in his question, referring instead to 'a history of treatment for a variety of impairments.' In our view, the fact that these conditions were not included in the hypothetical question rendered that question defective, and thus the expert's answer cannot be considered substantial evidence." *Ledoux v. Schweiker*, 732 F.2d 1385, 1388 (8th Cir.1984)) ("Hypothetical question [that] failed to consider the drowsiness and daytime sleep requirements of the appellant, his

Proper questions framed by the ALJ, however, are a significant aid to decisionmaking.<sup>40</sup> "Hypothetical questions posed to vocational experts should precisely set out the claimant's particular impairments. *Greene v. Sullivan*, 923 F.2d 99, 101 (8th Cir.1991). However, 'a proper hypothetical question "is sufficient if it sets forth the impairments which are accepted as true by the ALJ."'"<sup>41</sup>

Difficulties with hypothetical questions are not limited to federal ALJs for similar issues arise in state cases such as workers compensation cases.<sup>42</sup> The remedy of cross examination, however, is also recognized as a cure for problems whether they be inclusion or omission of facts from hypothetical questions.<sup>43</sup> Similar deference may

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borderline or defective IQ, his anxiety syndrome and his allegations of pain," was improper.); *Cripe v. Apfel*, --- F.Supp.2d ---, 1998 WL 656572 at \*6 (N.D.Iowa July 8, 1998) ("A review of the ALJ's decision shows that the ALJ selectively quoted from Dr. Brooks' treatment notes, isolating any statement that minimized the plaintiff's condition. A review of the treatment notes themselves shows a staggering combination of patient complaints and objectively verifiable symptoms. From January 3, 1992 to August 27, 1993, Dr. Brooks, a specialist in the diagnosis and treatment of rheumatoid arthritis, recorded and treated tenderness, pain and/or swelling in the plaintiff's hands, wrists, elbows, shoulders, neck, back, hips, knees, ankles, feet and jaws. On three occasions during the course of his treatment, Dr. Brooks set physical limitations for the plaintiff, each more stringent than the last. Dr. Brooks treated the plaintiff for over two years and examined her on at least eight occasions before giving the opinions in the November 1994 questionnaire. The court finds that those opinions are supported by the record. Dr. Brooks' assessment of the three omitted impairments is consistent with the medical evidence in the record. Accordingly, Dr. Brooks' opinions should have been given controlling weight and all impairments identified by Dr. Brooks should have been included in any hypothetical question relied upon by the ALJ. Because the ALJ's first hypothetical question did not completely describe the plaintiff's impairments, it was improper and could not serve as substantial evidence in the ALJ's decision.") See also *Rosario v. Shalala*, 836 F.Supp. 257, 262(E.D.Pa. 1993) ("ALJ's hypothetical question failed to contain pertinent findings made by the ALJ about Rosario's limitations."); *Hedstrom v. Sullivan*, 783 F.Supp. 553, 557(D.Colo.1992) ("[T]he ALJ told the vocational expert to assume that plaintiff's visual impairment would not significantly reduce her vocational potential and that her vision was sufficient for the vast majority of jobs existing in the national economy. He also told the expert to assume that claimant did not have problems with blurring and that she did not have to hold a page within an inch of her face to read. Finally, he told the expert to ignore plaintiff's complaints of aching, throbbing, and tearing in her eyes after 30 minutes of use. None of these assumptions in the hypothetical question are supported by substantial evidence in the record.")

<sup>40</sup> *Haynes v. Shalala*, 26 F.3d 812, 815 (8th Cir.1994) (in posing hypothetical questions to a vocational expert, an ALJ need only include those impairments believed to be true).

<sup>41</sup> *Hoetling v. Chater*, 1996 WL 204336 at \*9 (E.D.Mo. 1996).

<sup>42</sup> *Noblesville Casting Div. of TRW, Inc. v. Prince*, 438 N.E.2d 722, 728 (Ind. 1982).

<sup>43</sup> *Id.* at 737. "In *Dahlberg v. Ogle*, 268 Ind. 30, 373 N.E.2d 159 (1978), this Court held that hypothetical questions are not improper merely because facts pertinent to the evidence are omitted since a remedy is available via cross-examination."

be accorded state hearing officers in determining what facts should be included in a hypothetical question.<sup>44</sup>

Challenges have also been raised to ALJs questioning a potential expert witness on voir dire to qualify the witness as an expert.<sup>45</sup> Such challenges are likely to be rejected, for as a practical matter, someone must determine whether a proffered expert witness qualifies as such. To bar an ALJ from voir dire inquiry, risks a determination at the decision stage that no competent expert testimony had been presented, surely a nonsensical result if capable of being avoided during the hearing by additional questions and/or submission of an alternative expert witness.

Objections may be made to imprecise phrasing,<sup>46</sup> such as of a hypothetical question, but such errors also may be cured by the ALJ subsequently indicating understanding of the correct state of the law.<sup>47</sup> On occasion, a hearing officer might even herself call a witness and question them. Such action has been held permissible.<sup>48</sup>

Besides the requirements of due process, other provisions such as state constitutions or codes of judicial or administrative conduct may also constrain an ALJ's actions.<sup>49</sup> Such alternative bases for analysis appear to be rarely cited. In one such case the Louisiana Constitution

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<sup>44</sup> Ohio State Medical Bd. v. Zwick, 59 Ohio App.2d 133, 142, 392 N.E.2d 1276, 1282 (Ohio App. 1978).

<sup>45</sup> Fay-Ray Corp. v. Texas Alcoholic Beverage Com'n, 959 S.W.2d 362, 367-68 (Tex.App. 1998) (permission for commission to ask leading questions also not error).

<sup>46</sup> Intermountain Health Care, Inc. v. Board of Review of Indus. Com'n, 839 P.2d 841, 845-46 (Utah App. 1992)(imprecise phrasing).

<sup>47</sup> *Id.* at 846.

<sup>48</sup> Toro Development Co. v. Com., Dept. of Environmental Resources, 56 Pa. Cmwlth. 471, 481 n. 16, 425 A.2d 1163, 1168 (Pa. Cmwlth. 1981).

<sup>49</sup> Some examples of such authority include:

ABA Informal Op. 87-1524. (1987) A judge is not disqualified from presiding at a trial solely because of a former association in private practice more than two years previously with counsel for a party. This decision construed and applied Canon 3C(1) of the Code of Judicial Conduct which states as a general standard that: "[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned."

ABA Informal Op. 1477 (1981) A judge must recuse himself or herself from adjudicating cases in which a litigant is represented by the judge's own attorney, whether the lawyer is representing the judge in a personal matter or in a matter pertaining to the judge's official position or conduct, subject to the rule of necessity.

OH Adv. Op. 91-13 (1991). A judge should disqualify himself from a proceeding when his impartiality might reasonably be questioned and or when he has personal bias or prejudice toward a witness including such witnesses as a person who had engaged in marital counseling with respect to the judge and his wife.

was cited as well as the Louisiana Code of Civil Procedure as bases for barring the Director of a Department of Environmental Quality from conducting a hearing when the Director had prior to taking his current position acted as a consultant to a group which opposed similar facilities.<sup>50</sup> In addition, the Director had apparently discussed the substance of the matter with staff prior to the hearing commencing.<sup>51</sup>

### SUGGESTIONS:

In short, an ALJ has a fair degree of latitude to ask questions. In doing so, however, it would be well to consider the following suggestions:

1. Particularly when a party is represented by an attorney, ask a minor question early to clarify a point that has been made by a question to a witness. By doing so the ALJ establishes firm control of the hearing, and sends an overt message to both sides, you have to persuade me with the testimony; lack of clarity does not help.

2. When both sides are present through attorneys, ask questions to clarify matters when *both* attorneys are questioning witnesses. This conveys an appearance of impartiality and mitigates potential attacks.

3. When either attorney makes a valid objection, rule in their favor. When either attorney makes an incompetent or improper objection, rule just as impartially against them.

4. Utilize care when posing outcome determinative questions, such as hypothetical questions. However, when you are convinced that the evidence does not support inclusion of something in an hypothetical question, do not include that element in the question. The courts will back you up on appeal. However, permit an attorney to ask a modified question, including the element you omitted, so the answer is in the record. On the other hand, when deciding the case you are free to disregard the answer to the attorney's hypothetical question. If the attorney declines to ask any variant question, that failure may be a waiver for any possible appeal.

5. Attempt to eliminate "tones" of anger, hostility, aggression, contempt, and the like from questions. However, be aware that the courts have been quite tolerant of such tones when they are well earned

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<sup>50</sup> In the Matter of American Waste and Pollution Control Co., 581 So.2d 738, 745-47 (La. App. 1 Cir. 1991).

<sup>51</sup> *Id.* at 745.

by litigants or their attorneys and that fact appears on the face of the record.

6. Avoid if possible questions that again and again reflect such tones and appear to bore in on one side only. Too many questions may itself become problematical.

7. Avoid comments before the end of the hearing that are outcome determinative, such as "the accused is obviously guilty," the agency cannot tolerate an acquittal, or it would cost the agency money if it doesn't prevail. Such comments detract from the appearance of impartiality and are likely to produce reversals.

8. Offer when possible the opportunity to supplement material in the record with post hearing briefs. In only a few cases will this likely be taken up. If not, the matters will be considered waived on appeal. Moreover, such offers convey the appearance of fairness.

9. Do not feel constrained against a *voir dire* of a potential expert witness if you believe the qualifications of the witness are unclear. Since parts of their testimony may be particularly critical to the case before you, such *voir dire* may be an important guard to the ultimate validity of any final decision.

10. If you are required to decide the case immediately after the hearing, clear the room out of everyone connected to the parties while you deliberate and/or devise your opinion. This avoids the possibility of improper *ex parte* contact during the most sensitive part of the case from the viewpoint of litigants. The appearance of impartiality at this point is particularly critical.

11. If you are convinced that there is critical evidence that has not been presented, and that some witness or document may be available that can shed light on the matter, do not hesitate to order a continuance for the purpose of receiving more testimony or such documents. This assumes of course, that you have the power to order such continuances, and can receive post hearing evidence. If need be, call and question a witness yourself, allowing of course the opportunity to cross examine the witness to either side. If a written submission is elicited, make certain that each side has an opportunity to respond.

12. Be yourself. If you are confused by the record, chances are any reviewing court would share that confusion. It is your job to clear it up, even if it means stepping on sensitive attorney toes. Reviewing courts are more likely to appreciate your efforts to produce clarity, than

to castigate and reverse your honest attempts at conducting a proper hearing.

### CONCLUSION:

The ALJ acts today under multiple constraints far different from those of a common law judge in the past. She is certainly constrained by the due process clause but the clause itself has far broader scope than it used to have. "The due process clauses come from English jurisprudence, which had a simple rule: 'a judge was disqualified for direct pecuniary interest and for nothing else.'"<sup>52</sup> Still, reported case decisions strongly indicate that ALJs are accorded substantial deference for a broad range of conduct, including situations in which they sometimes become quite vigorous questioners.<sup>53</sup>

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<sup>52</sup> See concurring opinion by Judge Easterbrook in *Del Vecchio v. Illinois Dept. of Corrections*, 31 F.3d 1363, 1389, 1390 (7th Cir. 1994) (en banc), cert. denied, 514 U.S. 1037 (1995).

<sup>53</sup> See, Broida, A GUIDE TO MERIT SYSTEMS PROTECTION BOARD LAW & PRACTICE MSPBG CH 3, IV, "Although the case did not involve an administrative judge, the discussion in *Chocallo v. SSA, DHEW*, 1 MSPR 605, 2 MSPB 23 (1980) (ALJ Decision), involving removal of a SSA ALJ, includes considerable commentary on the type of conduct that will subject an adjudicator to a well-founded allegation of bias and inappropriate behavior during the conduct of a case. Examples in the discussion include refusal to permit a party's counsel a reasonable opportunity to question witnesses, questioning by the adjudicator of a client concerning matters protected by the attorney-client privilege, disparagement of counsel during the hearing and in a written opinion, and curt, impatient and domineering behavior by a judge toward counsel. See *Matosian v. Dept. of Air Force*, 56 MSPR 689, 696 (1993) ('Even assuming that the appellant is correct in arguing that the administrative judge's demeanor was occasionally impatient or unpleasant, such behavior does not, in itself, constitute bias.')."